Supreme Court, U.S.
FILED
AUG1 1980
MICHAEL RODAK, JR., CLERK

No. 80-154

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

STANLEY S. MOLES, M.D., Petitioner,

v.

THE MORTON F. PLANT HOSPITAL, INC., a Florida not-for-profit corporation; JOHN B. SWEGER; PAUL STRAUB, M.D.: T. JOHNSON ROSS, M.D.: LAWRENCE R. BUCKLEY M.D.: RICHARD MERIWETHER, M.D.: WADE HATCHER, M.D., Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

PETITION

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 78-2300

STANLEY S. MOLES, M.D.,

Plaintiff-Appellant,

versus

THE MORTON F. PLANT HOSPITAL, INC., a Florida not-for-profit corporation, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

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(MAY 8, 1980)

Before GOLDBERG, GARZA and REAVLEY, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1/]

1/ See N.L.R.B. v. Amalgamated Clothing Workers of America, 1970, 430 F.2d 966.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

STANLEY S. MOLES, M.D., through his undersigned counsel prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in the above case on May 8, 1980.

QUESTIONS PRESENTED

1. Whether the practice of medicine for compensation through federally funded health care programs (Medicare and Medicaid) and from insurance carriers operating in interstate commerce may have a not insubstantial effect on interstate commerce so that it is within the purview of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2)?

2. Where the Complaint alleges a boycott with the effect of restraining Petitioners' interstate commerce in the provision of health care services for compensation, did the Court below err in affirming the District Court's dismissal of the action on motion for lack of subject matter jurisdiction and failure to state a claim?

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OPINIONS BELOW

The opinion of the District Court for the Middle District of Florida granting Respondents' Motion to Dismiss is printed in Appendix A hereto and is not reported. The Court of Appeals affirmed the District Court without opinion. The per curiam affirmance is printed in Appendix B hereto.

JURISDICTION

The decision of the Court of Appeals printed in Appendix B hereto was entered on May 8, 1980. Rehearing was not sought by Petitioner. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Federal Statutes involved are the Sherman Anti-Trust Act, 15 U.S.C. §§1, 2 and 15. 15 U.S.C. §1 provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. §2 provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemguilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. §15 provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

The Complaint was filed in the District Court by two Plaintiffs. The Plaintiff, MYRON W. WHEAT, JR., M.D., did not participate in the appeal to the Fifth Circuit Court of Appeals and is not a party to this Petition.

Petitioner, STANLEY S. MOLES, M.D., is a physician licensed to practice medicine in Florida. He originally was appointed to the Respondent hospital's medical staff in 1964 and was granted "staff privileges" annually thereafter

through 1975. His "staff privileges" were revoked by the hospital on April 7, 1976, upon the recommendation of the individual Respondent doctors. It is important to note the Petitioner Moles was not an employee of the hospital and does not seek employment. His appointment to the hospital's staff ("staff privileges") was and is necessary to utilize the hospital's facilities in the care of his patients.

Petitioner's Complaint was in three counts. Count I alleged a violation of 15 U.S.C. §§1 and 2 with the right to bring a private cause of action conferred by 15 U.S.C. §15. The activity complained of was an unlawful combination and conspiracy to restrain Petitioner's interstate commerce in the provision of health care services for compensation from federal health care programs and from insurance carriers

operating in interstate commerce. Jurisdiction for Count I was invoked under 28 U.S.C. §1337. Count II was a civil rights action and Count III was a libel action arising under state law. The dismissal of Counts II and III was not appealed to the Fifth Circuit Court of Appeals and is not raised in this Petition.

Upon Respondents' pre-answer Motion to Dismiss, the District Court ruled the individual Respondents were all officers or agents of the hospital corporation and there could be no conspiracy among those individuals and the corporation. In fact, the individual Respondent doctors were not acting as officers or agents of the corporation and no facts to support the District Court's ruling in this regard were presented.

After determining there could be no net change in interstate commerce

as a result of the complained-of activities, the Court concluded:

> "The amount of work Plaintiffs do may be reduced as a result of Defendants' actions, but this work involves practicing medicine and furnishing medical services which is wholly intrastate."

(District Court opinion, Page 12, Appendix A hereto). No facts to support either of these conclusions were presented to the Court.

The District Court entered its judgment of dismissal (Appendix A hereto). Appeal was timely taken to the Fifth Circuit Court of Appeals. Oral argument was taken by the Fifth Circuit on May 6, 1980, and its per curiam affirmance of the dismissal was filed May 8, 1980 (Appendix B hereto).

REASONS FOR GRANTING THE WRIT

1. This case merits review by this Court on certiorari to decide whether the practice of medicine for compensation through federally funded health care programs (Medicare and Medicaid) and from insurance carriers operating in interstate commerce may have a not insubstantial effect on interstate commerce so that it is within the purview of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2).

2. This case merits review by this Court on certiorari because the decision of the Court below deviates substantially from the pronouncements of the Supreme Court that antitrust actions should not be dismissed on pre-answer motion with no opportunity for discovery and proof of subject matter jurisdiction.

ARGUMENT

POINT I

This case presents the question of whether medical doctors who provide care to local patients in local hospitals in exchange for compensation through health care and insurance programs which operate in interstate commerce may have a not insubstantial effect on interstate commerce for purposes of Sherman Act jurisdiction. This fundamental question is of great and recurring significance in defining the application of the Sherman Anti-Trust Act to the health care industry.

In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), this Court determined the business of lawyers who provide title insurance for out-of-state real estate lenders has a not insubstantial effect on interstate commerce. In Hospital Building Co. v. Trustees of Rex

Hospital, 425 U.S. 738 (1976), this Court determined the anticompetitive efforts of one local hospital directed at another local hospital may be examined under the Sherman Act. In McLain v. Real Estate Board of New Orleans, Inc., __ U.S __, 100 S.Ct. 502, __ LEd.2d __ (1980), this Court determined the services of local real estate brokers, and price fixing with respect to commission rates may have a not insubstantial effect on interstate commerce for Sherman Act purposes.

The Court below, in the instant case, has denied application of the Act to medical doctors, agreeing with the Tenth Circuit that the practice of medicine and furnishing medical services involves, as a matter of law, only intrastate activities and is, therefore, outside the purview of the Act. As discussed infra, based on recent Supreme

Court decisions, the Tenth Circuit appears ready to recede from that doctrine.

In the instant case, the Fifth Circuit affirmed the Court's pre-answer dismissal of the complaint without opinion. The District Court, in an unpublished opinion (Appendix A hereto), reviewed Petitioner's interstate commerce allegations, determined there would be no net effect on interstate commerce and held:

> "The amount of work plaintiffs do may be reduced as a result of defendants' actions, but this work involves practicing medicine and furnishing medical services which is wholly intrastate. See Wolf v. Jane Phillips Episcopal-Memorial Center, 513 F.2d 684 (10th Cir. 1975)." (District Court Opinion, Page 12, Appendix A hereto). hereto).

Wolf v. Jane Phillips Episcopal-Memorial Center holds that the practice of medicine is not trade or commerce within the

purview of the Sherman Act. In Crane v. Intermountain Health Care, Inc., __ F.2d __ (10th Cir. 1980) (1980-1 Trade Cases ¶63122, p. 77593, 10th Cir. Case No. 78-1346), the Tenth Circuit panel relied on Wolf to decide a pathologist was neither engaged in nor had an effect on interstate commerce. The plaintiff in Crane urged that Wolf was superseded by Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976) and Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The Tenth Circuit panel declined to overrule the Wolf doctrine, notwithstanding those cases, holding "one panel of the court of appeals should not overrule the decision of another panel." (Crane, supra, at p. 77596).

Judge McKay, specially concurring in the Crane result wrote:

> "'In the Sherman Act, Congress has been taken to have exer-

> cised to the fullest its power over commerce' [citation omitted]. I do not believe that our opinion in [Wolf] is consistent with either that congressional purpose or recent Supreme Court pronouncements. At this late date, we can no longer reasonably assert that the 'business of practicing medicine and furnishing medical services is wholly intrastate'in character [citing Wolf]." Crane, supra, at p. 77596.

Until Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), there was a serious question as to whether doctors were engaged in "commerce" by reason of the so-called "learned profession exemption". Goldfarb held that the professions have a business aspect through the exchange of services for money. Recognizing the fact of that commerce, but relying on the Wolf doctrine, the Court below held the practice of medicine and medical services are, as a matter of law, performed wholly intrastate and are,

therefore, outside the purview of the Sherman Act.

It is not the local character of the activity itself which determines jurisdiction. In Goldfarb, jurisdiction was based on the interstate aspects of real property transactions involving title insurance to out-of-state lenders. The rule was reiterated in Hospital Building Company:

> "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." Hospital Building Company, supra.

Judge McKay, in Crane, supra, quoted the test as stated in L. Sullivan, Antitrust 710 (1977):

> "Under the 'affecting commerce' test, 'it is not the quantitative substantiality of the impact on the flow of commerce that is critical. . .; if a local activity has in a practical sense a significant

> impact on competition in commerce and if the commerce so affected is substantial in amount, the [Sherman] Act applies to the local activity. . .'." Crane, supra at p. 77596.

This Court, in Goldfarb and Hospital Building Company, decided that it is in the practical sense that inquiry as to interstate commerce involvement is to be made. But Wolf, and the instant case, limit the inquiry to whether the activity itself is in interstate commerce. The result is anomalous: A doctor practicing near the border of a state who has out-of-state patients is involved in interstate commerce and the Act applies (See; e.g., Feminist Women's Health Center v. Mohammed, 586 F.2d 530 (5th Cir 1978). Another doctor, practicing in central Florida whose patients are principally local is not in interstate commerce. Both doctors, however, receive

payment from the same interstate fund (Medicare, Medicaid and insurance), and it is that payment which creates the commerce. Merely performing the services, without compensation, is not "trade" or "commerce". As held in Goldfarb, it is the exchange of services for money which is commerce. Therefore, the local nature of the services themselves is irrelevant. And, therefore, Judge McKay is correct in Crane, supra, when he writes the Wolf doctrine is not valid in light of Goldfarb and Hospital Building Company.

The Supreme Court, in McLain v. Real Estate Board of New Orleans, Inc., __ U.S. __, 100 S.Ct. 502, __ LEd.2d __ (1980), collected and summarized the jurisdictional authority relevant to this case. In that case, the bare allegations of the Complaint coupled with the allega-

tion that the respondents were engaged in an unlawful restraint of "interstate trade and commerce" was held sufficient. The Supreme Court decided that:

> "Ultimately, whatever stimulates or retards the volume of residential sales, or has an impact on the purchase price, affects the demand for financing and title insurance, those two commercial activities that on this record are shown to have occurred in interstate commerce. Where, as here, the services of respondent real estate brokers are often employed in transactions in the relevant market, petitioners at trial may be able to show that respondents' activities have a not insubstantial effect on interstate commerce." McLain, supra.

In McLain, the petitioner was peripherally involved with the activities involving interstate commerce. In the instant case, the petitioner is directly involved in the flow of interstate funds. The physician not only receives payment by virtue of the interstate flow of

benefits, but assists in determining the size of the fund available for payments through establishment of the "usual and customary" fee for services in the relevant market area.

The entire purpose of antitrust legislation is to promote quality, availability and lower cost to the consumer through discouragement of anticompetitive practices. The benefits of free enterprise and competition, recognized in all other industries, should now be recognized in the technologically modern but structurally archaic health care industry. The cost of health care has been increasing dramatically while the industry remains, for practical purposes, exempt from any requirement that the cost of services rendered be determined competitively. The federal government mandates control over technological costs

through requiring the states to adopt "certificate of need" legislation. In that way, expensive equipment and buildings are not duplicated or triplicated locally without demonstrating the necessity of multiple similar facilities. The result, however, absent the free availability of those facilities to all qualified physicians, is to create local monopolies and encourage the evils which the Sherman Act seeks to eliminate.

The President of the United States, in his State of the Union Address January 23, 1978, emphasized:

> "We must act now to protect all Americans from health care costs that are rising one million dollars an hour, 24 hours a day - doubling every five years. We must take control of the largest contributor to that inflation - skyrocketing hospital costs." As reported in the "St. Petersburg [Florida] Times", January 24, 1978.

Continuing, the President insisted:

> "We must also fight inflation by improvements and better enforcement of antitrust laws, and by reducing government obstacles to competition in the private sector." Ibid.

In the health care industry, consumption decisions as to cost, availability and quality are made not by the consumer but by the provider. The individual practitioner, as in the instant case, may be removed from the market arbitrarily, simply and effectively. The result is to create local monopolies which control the availability, quality and cost of health care services paid for through interstate commerce and the destruction of the affected practitioner's interstate commerce. The problem was aptly stated by Mr. Joe Sims, Deputy Assistant Attorney General for Antitrust:

> "The benefits of a free enterprise society are widely extolled in the abstract but are frequently shuffled aside in specific situations. It is inevitably the case of those who seek exceptions from the ordinary free enterprise rules, or those seeking to undertake particular anticompetitive activities, are capable and willing to make the case for their proposed course of conduct; and we see today in the health care field the results of that effective advocacy."
> Mr. Joe Sims, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, speaking at The Second Annual Seminar on Antitrust In the Health Care Field, December 12, 1977, as published in Antitrust in the Health Care Field, 76, National Health Publishing Ltd., Townsend, MD. 1979 (p.84).

ARGUMENT

POINT II

The dismissal on motion adjudicated, as a matter of law, the question of fact as to whether the practice of medicine has a not insubstantial effect on interstate commerce.

This Court, in Hospital Building Company v. Trustees of Rex Hospital, 425, U.S. 738 (1976), restated the rigorous test to be applied on motion to dismiss:

> "We have held that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief [citation omitted]. And in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators' [citation omitted], dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly."

With no facts before it other than those alleged in the complaint, the District Court concluded there could be no net effect on interstate commerce and, therefore, no subject matter jurisdiction.

> "Although plaintiffs' interstate commerce allegations are set forth at length in the complaint, they all center upon one fact. Many patient bills are paid by insurance companies or by the federal government. Funds for the payment of these bills necessarily travel in interstate commerce. Plaintiffs allege that the amount of funds received by them from the Federal government and interstate insurance carriers is dependent upon plaintiffs' access to hospital facilities." (Opinion, Appendix A, p. 10)

The Court recognized, therefore, the involvement of interstate commerce but decided there could be no net change on that commerce:

> "It is plaintiffs' patients who are responsible for the payment of plaintiffs' fees, however. These fees are incurred for services performed intrastate. The patients are local residents. There has been no allegation that defendants have caused any increase (or decrease) in fees charged thereby causing a change in the flow of insurance benefits flowing in interstate commerce

> from the federal government and/or insurance carriers to the ultimate beneficiaries." (Opinion, Appendix A, p. 11)

Thus, the Court found the fact of interstate commerce involvement was alleged but determined, on motion to dismiss, its flow could not be altered as a result of the respondents' activities.

No matter who the "ultimate beneficiaries" are with respect to the interstate flow of health care funds it is Petitioner and other physicians who not only stimulate but directly cause the flow to occur. As this Court held in McLain v. Real Estate Board of New Orleans, Inc. ___ U.S. ___, 100 S.Ct. 502, ___LEd.2d ___(1980), ". . .whatever stimulates or retards the volume [of interstate commerce]. . ." may have a not insubstantial effect on that interstate commerce. As the Court held in McLain, Petitioner should be allowed to prove the effect at trial.

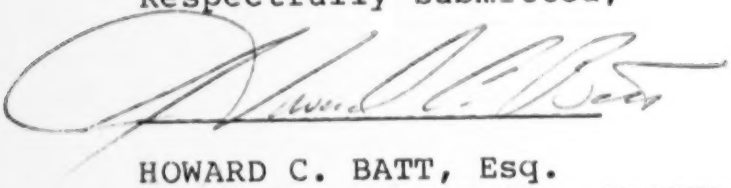
CONCLUSION

The business part of the health care industry is conducted entirely interstate. It is inconceivable that this very significant business, which consumes such a substantial part of the gross national product and which has such a direct and dramatic economic effect on nearly every American consumer of health care services and insurance, should be outside the purview of the Sherman Act.

This Court should review this case to determine whether the rules announced in Goldfarb and McLain, supra, are applicable to the practice of medicine and delivery of health care services. This Court should determine, through granting the petition, whether the Court below was correct in deciding that, in no event, could the practice of

medicine have any effect on interstate commerce.

Respectfully submitted,



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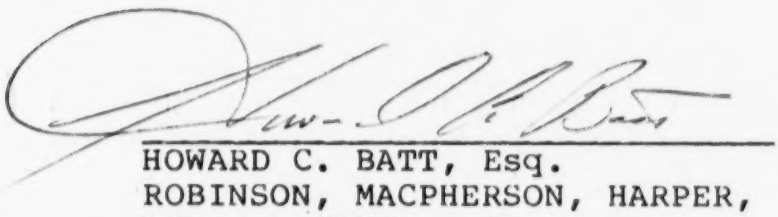
CERTIFICATE OF SERVICE

I, HOWARD C. BATT, Attorney for STANLEY S. MOLES, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1ST day of August, 1980, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on the the several Respondents thereto, as follows:

> On all the Respondents, by leaving three copies thereof at the office of of Emil C. Marquardt, Jr., Esq., Counsel for the Respondents, at his office at 400 Cleveland Street, Clearwater, Florida 33515.



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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

STANLEY S. MOLES, M.D. et al.,

Plaintiffs,

vs. Case No. 75-574-Civ-T-Y

THE MORTON F. PLANT HOSPITAL, INC., etc., et al.,

Defendants.

MEMORANDUM OPINION

This cause is before the Court on the defendants' motion to dismiss the complaint. Extensive memoranda have been filed by both sides in the case. On October 12, 1977 the Court heard counsel for the parties argue the motion. A ruling was deferred so that the Court might take the matter under advisement.

Because this case comes before the Court on a motion to dismiss, the

only relevant facts are those alleged in plaintiff's complaint. All allegations of the complaint must be presumed true for purposes of the Court's ruling. The complaint should not be dismissed for failure to state a claim unless if appears beyond a doubt that the plaintiffs can prove no set of facts in support of their claim. Cruz v. Beto, 405 U.S. 319, 322 (1972); Mann v. Adams Realty Co., Inc., 556 F.2d 288, 293 (5th Cir. 1977). The Fifth Circuit has tended to disfavor the granting of motions to dismiss except in those cases where the plaintiff has been afforded every opportunity to state a claim upon which relief can be granted, but has failed to do so. See Hitt v. City of Pasadena 561, F.2d 606 (5th Cir. 1977).

The complaint at bar consists of three counts. All three involve a

refusal by defendant Morton F. Plant Hospital, Inc. to renew the Hospital staff privileges of Dr. Stanley S. Moles and to grant the application of Dr. Myron W. White, Jr. for staff privileges in the first place. The court will address itself to each count separately.

COUNT ONE

Count One of the complaint alleges a violation of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§1 & 2). The defendants are alleged to have combined and conspired with one another to prevent plaintiffs from having access to hospital facilities in the Clearwater, Florida area. The individual defendants are alleged to have acted in excess of their authority as officials of the defendant hospital in making the decision not to renew plaintiff Moles' staff privileges and not to consider

plaintiff Wheat's application for new staff privileges.

Plaintiffs have argued that Count One states a claim based upon a theory of group boycott. As such, plaintiffs argue that the defendants' conduct falls into the category of cases involving per se violations of the Sherman Act and that the reasonableness of defendants' actions is therefore immaterial. See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Fashion Originators' Guild of America v. Federal Trade Commission, 312 U.S. 457 (1941).

Crucial to plaintiffs' allegations of boycott, however, is the allegation that the individual defendants were acting as such and not as officers of the defendant hospital. The case law is well settled that the Sherman Act's conspiracy or agreement requirement is not met by a

"conspiracy" between a corporation and its corporate officers. Soloman v. Houston Corrogated Box Co., Inc., 526 F.2d. 389, (5th Cir. 1976).

Looking at paragraphs 5 thru 9 of the complaint, the Court finds plaintiffs have alleged therein the capacity of each defendant. The Hospital is alleged to be a not-for-profit corporation, and defendant John Sweger is alleged to have been Chairman of the defendant Hospital's Baord of Trustees. The Board of Trustees allegedly has final authority regarding medical staff appointments. Defendant Roger White is alleged to be the Hospital's Executive Director in charge of daily administration. Neither Sweger nor White are doctors.

The five remaining defendants are doctors. All are alleged to be members of the Executive Committee of the

defendant Hospital's medical staff. Defendant Paul Straub was Chairman of the Executive Committee. The other four doctors constituted an ad hoc committee of the Executive Committee. This ad hoc committee was convened on January 29, 1976 to review the actions of the full Executive Committee in refusing to renew plaintiff Moles' medical staff privileges.

Despite conclusory allegations later in the complaint, Count One fails to allege how the four defendants on the ad hoc committee have anything to do with the hospital's refusal to consider plaintiff Wheat's application for staff privileges. The Court finds a real distinction between the refusal to renew Moles' privileges and the administrative denial of plaintiff Wheat's initial application for privileges. Although portions of plaintiffs' complaint seem to

equate the two events, other allegations of the complaint demonstrate that the two are entirely different transactions, although they involve the same hospital.

As paragraph 11 of the complaint alleges, plaintiff Wheat's application was denied by the defendant Hospital's administration without consideration. The application was apparently not referred to the Hospital's doctors for consideration. This allegation characterizes a single refusal to deal, not a group boycott, and as such is not prohibited by the Sherman Act. But even assuming plaintiff Wheat has been the victim of the same sort of actions as plaintiff Moles, the question of group boycott remains.

Aside from the conclusory allegations in paragraph 27 of the complaint that the individual defendants acted

"in excess of their authority as hospital officials," the complaint lacks any allegations of fact to show that the individual defendants were not acting as officers of the hospital corporation. At issue therefore is whether this allegation alone is sufficient to state a claim for relief. The Court is aware of course, that dismissals in antitrust proceedings, prior to giving plaintiff an opportunity for discovery, should be granted very sparingly. Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. 738, 746 (1976). A close examination of the nature of the case at bar is therefore warranted in order to determine if this case presents an exception to the general rule.

In order to state a claim for relief, plaintiffs must allege some facts which indicate a true conspiracy, rather

than a single refusal to deal on the part of a corporation. In the case at bar plaintiffs have failed to allege any facts - as opposed to mere legal conclusions - which would indicate that the defendants (sic) hospital was capable of conspiring with those persons who are alleged to be its own officers and agents.

But the court need not make consideration of this question alone dispositive. Before deciding the motion in the case at bar one further ground for dismissal deserves discussion. The defendants have challenged plaintiffs' allegations of a substantial effect upon interstate commerce.

Fourteen paragraphs of plaintiffs' complaint are devoted to allegations regarding interstate trade and commerce. Concededly, the facts of this case involve one private local

hospital and two local doctors who seek to practice therein. Any conspiracy, assuming one exists, is purely local and is not "in interstate commerce". In order to invoke this court's jurisdiction in stating a claim for relief as to Count One, plaintiffs' must therefore adequately allege that the defendants' conduct has a substantial effect on interstate commerce. Hospital Building Co. v. Trustees of the Rex Hospital, 425 U.S. 738 (1976).

Although plaintiffs' interstate commerce allegations are set forth at length in the complaint, they all center upon one fact. Many patients bills are paid by insurance companies or by the federal government. Funds for the payment of these bills necessarily travel in interstate commerce. Plaintiffs' allege that the amount of funds received by them from the federal government and

interstate insurance carriers is dependent upon plaintiffs' access to hospital facilities.

It is plaintiffs' patients who are responsible for the payment of plaintiffs' fees however. These fees are incurred for services performed intrastate. The patients are local residents. There has been no allegation that defendants have caused any increase (or decrease) in fees charged thereby causing a change in the flow of insurance benefits flowing in interstate commerce from the federal government and/or insurance carriers to the ultimate beneficiaries.

Defendants' actions have not been alleged to affect plaintiffs' relationships with the insurance carriers or the federal government. Nor have defendants' actions affected plaintiffs'

patients' relationships with their insurors. It is not alleged that the patients will purchase any less insurance as a result of defendants' actions. Plaintiffs' still are entitled to be paid just the same for the work they do. The amount of work plaintiffs' do may be reduced as a result of defendants' actions, but this work involves practicing medicine and furnishing medical services which is wholly intrastate. (See Wolf v. Jane Phillips Espicopal-Memorial Center, 513 F.2d 684 (10th Cir. 1975).

Counsel for the defendants has called the court's attention to the recent order entered by Judge Robinson in the case of Ann Morgolin (sic) v. Morton Plant Hospital, et al., No.75-209-Civ-T-H (M.D. Fla., Feb. 17, 1978). Judge Robinson granted the defendants' motion

to dismiss at the conclusion of the plaintiff's presentation of evidence at trial. The Court found insubstantial effects upon interstate commerce to justify relief under the sherman Act. Counsel for plaintiffs in the case at bar have pointed out to the court that the present case is in a wholly different posture, there having been no discovery or presentation of evidence.

Plaintiffs' are correct in attacking defendants' reliance upon the Margolin case. At the same time, however, this Court cannot shut its eyes to the reality of the situation at hand. The allegations of plaintiffs' complaint, taken as true, do not indicate a situation substantially different from that presented to the court in Margolin.

Moreover, the allegations of the case at bar do not rise to the same

level as the combination of factors that was found to be significant to state a claim in Hospital Building Co. v. Rex Hospital Trustees, 425 U.S. at 744. Here all the allegations regard a diminution of interstate insurance payments to plaintiffs, but the flow in interstate commerce would be the same. The affect of defendants' actions would be on plaintiffs but not on the flow of interstate commerce. This differs from the Rex Hospital case where it was alleged that interstate commerce would be substantially reduced by the loss of plaintiffs' purchases of supplies. The plaintiff hospital in Rex Hospital also allegedly paid over its revenue to an out-of-state parent corporation. Those payments were alleged to be reduced by defendants' actions. Finally, the Supreme Court noted the plaintiff's allegations that

the financing for the plaintiff hospital's planned expansion, which had been allegedly thwarted by defendants' actions, would be substantial and would come from out of state lenders. Neither a combination of such factors nor any of them is alleged in the case at bar.

Taking into consideration all the allegations set forth in Count One of the complaint, the Court finds that Count One fails to state a claim for relief. Not only are the interstate commerce allegations insufficient, but in addition, the allegations of conspiracy fail to adequately allege that some person other than an officer or agent of the defendant hospital corporation conspired with the defendant hospital. Each of these defects, when viewed separately and in conjunction with each other, justify the Court's granting of the defendants'

motion to dismiss Count One of the complaint.

COUNT TWO

[DELETED AS IRRELEVANT TO THIS PETITION]

COUNT THREE

[DELETED AS IRRELEVANT TO THIS PETITION]

Separate judgment shall be entered in accordance herewith.

DONE AND ORDERED in Chambers at Orlando, Florida this 10th day of May, 1978.

/s/ GEORGE C. YOUNG
CHIEF JUDGE

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

STANLEY S. MOLES, M.D. et al.,

Plaintiffs,

vs. Case No. 75-574-Civ-T-Y

THE MORTON F. PLANT HOSPITAL, INC., etc., et al.,

Defendants.

_____/

J U D G M E N T

In accordance with the Memorandum Opinion entered simultaneously herewith, it is

ORDERED AND ADJUDGED that the defendants' motion to dismiss Counts One and Two of the complaint be and is hereby granted; and it is further

ORDERED and ADJUDGED that the defendants' motion to dismiss Count Three of the complaint be and is hereby granted, but without prejudice to plain-

tiffs refiling the same in the appropriate state court.

SO ORDERED in Chambers at Orlando, Florida, this 10th day of May, 1978.

/s/ GEORGE C. YOUNG
CHIEF JUDGE

Copies to:

Counsel of record